No. 82-1501

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

---

AMALIA MUSICO,
*Petitioner,*

v.

FRANCIS G. MUSICO, JR., individually and as Personal Representative of the Estate of Francis G. Musico, deceased,
*Respondent.*

---

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

---

JOHN R. HARGROVE, ESQ.*
ACE J. BLACKBURN, JR., ESQ.
McCUNE, HIAASEN, CRUM,
FERRIS & GARDNER, P.A.
Post Office Box 14636
Fort Lauderdale, Florida 33302
(305) 462-2000
*Attorneys for Petitioner*

* Counsel of record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-1501

---

AMALIA MUSICO,

*Petitioner,*

v.

FRANCIS G. MUSICO, JR., individually and as Personal Representative of the Estate of Francis G. Musico, deceased,

*Respondent.*

---

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

---

### INTRODUCTORY STATEMENT

Respondent misstates the requirement for preserving the right to assert the jurisdiction of the Supreme Court of the United States when a state court has offended the "full faith and credit" clause. Respondent also misstates petitioner's characterization of the asserted denial of full faith and credit by the Florida courts. Finally, respondent misstates controlling New York law, and particularly the holding of *In re Warren's Estate*, 299 N.Y.S.2d 1004 *aff'd* 236 N.Y.S.2d 628, 187 N.E.2d 478 (N.Y. 1962), that property rights vest as of the date of death, and therefore a failure to acknowledge or prove a marital

contract prior to a spouse's death is not curable after the spouse dies.

For these reasons, petitioner wishes to reply briefly to respondent's argument.

## I.

## THE CONSTITUTIONAL ISSUE WAS PROPERLY PRESERVED

Respondent claims that petitioner raised the denial of full faith and credit too late and therefore the point has not been properly preserved. He cites as primary authority *Hanson v. Denckla*, 357 U.S. 235 (1958) then proceeds to misconstrue that case. This Court held in *Hanson*, that where a party has a prior *opportunity* to raise a full faith and credit issue in state court proceedings and does not then raise the point, but instead waits and raises it in a motion for rehearing after an adverse ruling, the Supreme Court of the United States may decline to determine the merits of the issue because of the failure to preserve the point in a timely manner. In other words, a denial of full faith and credit must be raised at the time the issue first arises—not later.

This case is not inconsistent with the holding in *Hanson v. Denckla*. Here petitioner had just one opportunity to raise the denial of full faith and credit and this opportunity arose for the first and *only* time in the appellate decision now being reviewed. As stated by petitioner in her initial brief, there was no constitutional issue presented to the Florida appellate court because the alleged "misapplication" of New York law by the trial court did not constitute a violation of full faith and credit. It was not until the appellate court *on its own initiative* dismissed the substantive right of petitioner under New York law as "procedural" that "full faith and credit" became an issue. Therefore, it was at that time that petitioner challenged the adverse ruling on a constitutional basis.

Indeed, this Court has not applied the harsh rule suggested by respondent where the constitutional question arose from an unanticipated act of the state court. *See Herndon v. State of Georgia*, 295 U.S. 441 (1935); *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). To the contrary, this Court has permitted review of a constitutional issue even where the state appellate court in denying a petition for rehearing does not even refer to the federal question raised in the petition itself. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930). Respondent's suggestion that constitutional issues should be preserved before they arise is at best a cynical position.

## II.

## "MISAPPLICATION" OF NEW YORK LAW NOT IN ISSUE

Respondent misstates petitioner's basis for asserting her full faith and credit argument. For example, at page 6 of her initial brief, petitioner does *not* argue, or even suggest, that the Florida trial court's "misapplication" or "misconstruction" of New York law is a denial of full faith and credit. Petitioner in fact recognized that the "misapplication" of the law of a sister state does not constitute a denial of full faith and credit. In this case, such misapplication merely formed the basis for her appeal to the Florida appellate court on a question of interpretation. More to the point, it was the characterization of New York law by the Florida appellate court as "procedural", and the refusal to apply such law on that stated basis, which constitutes the denial of full faith and credit. This alone forms the basis of her petition to this Court.

Respondent cites *Glenn v. Garth*, 147 U.S. 360 (1893), and its progeny, as standing for the "rule" that there is no denial of full faith and credit where the law of a sister state has been misconstrued. However, none of the

cases deals with an assertion of a denial of a substantive right created by a state statute which, in effect, has been made a part of a written contract, such as in the context of *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), the primary case cited by petitioner.

## III.

## RESPONDENT MISSTATES NEW YORK LAW

*In re Warren's Estate*, 299 N.Y.S.2d 1004, *aff'd.* 236 N.Y.S.2d 628, 187 N.E.2d 478 (1962), is the controlling New York decision on the question of the formalities of execution regarding a waiver of marital rights. The application of *Warren* to this case falls squarely within the holding of *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), in that the refusal of the Florida courts to recognize and apply the strict New York requirement as to execution cannot be justified on the ground that such formalities are mere procedural irregularities. Interestingly, *Yates* is neither cited nor discussed by respondent.

In any event, New York law is clear; in order for a waiver to be effective to bar the election rights of a surviving spouse, it must satisfy the formalities of execution *prior* to the date of the deceased spouse's death. Not a single appellate level decision rendered since *Warren* even suggests—much less holds—to the contrary. *See Irving Trust Company v. Day*, 314 U.S. 556 (1942); *see also In re Kucera*, 73 Misc.2d 456, 342 N.Y.S.2d 812 (1973) and *In re Howland's Will*, 284 A.D. 306, 132 N.Y.S.2d 451 (1954) (statute requires acknowledgment during lifetime of spouse and failure to do so voids agreement).

It is surprising that the New York court in *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd* 29 N.Y.S.2d 429, *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942), failed to recognize that property rights vest on the date of death. The probable reason is that the point was not

raised, and therefore not considered or decided in *Maul*. However, the courts in *Howland* (decided twelve years after *Maul*), in *Warren* (decided twenty years after *Maul*), in *Held* (decided twenty-five years after *Maul*), and in *Kucera* (decided thirty-one years after *Maul*) saw the point exactly. The ruling has been stated, defined and refined numerous times. Unquestionably *Warren* is the controlling substantive law of New York.

## CONCLUSION

Since the required statutory element of proof was never properly satisfied in this case, the Musico agreement is absolutely void, and the Florida appellate court's refusal to regard this element as a "substantive" requirement flies directly in the face of the full faith and credit clause and this Court's decision in *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). As stated in *In re Warren's Estate*, the harsh result of voiding such agreements generates an increased respect for the strong public purpose which the strict execution requirements implement. 229 N.Y.S.2d at 1006. The full faith and credit clause requires the Florida courts to give the same effect to the New York statute creating this substantive right as it was shown to receive in New York. As petitioner stated in her initial brief, our population is continuing to migrate to the "sunbelt" area—primarily from New York to Florida—at an alarming pace.[1] Second marriages are now commonplace, and marital contracts, controlled and governed by the substantive law of the states of their origin, are proliferating in number. If the forum courts are free to dismiss substantive rights, acquired by the parties, then all hope of relying upon and respect for such rights will necessarily be lost. Petitioner,

---

[1] In Florida, where the total of those who moved in from other states between 1975 and 1980 was 1.8 million, more than 364,000 of them came from New York . . . Miami Herald, April 4, 1983, at 3A at Col. 1.

therefore, respectfully urges this Court to assume jurisdiction and recognize her substantive right—which the Florida courts failed to do.

Respectfully submitted,

JOHN R. HARGROVE, ESQ.*
ACE J. BLACKBURN, JR., ESQ.
McCUNE, HIAASEN, CRUM,
FERRIS & GARDNER, P.A.
Post Office Box 14636
Fort Lauderdale, Florida 33302
(305) 462-2000
*Attorneys for Petitioner*

* Counsel of record